NO. 78-803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CORNELIUS J. KEHOE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cornelius J. Kehoe, petitions for a Writ of Certiorari to review the judgment of the United Court of Appeals for the Fifth Circuit in this case (No. 76-4346).

OPINIONS BELOW

The per curiam opinion of the Court of Appeals on the Government's petition for rehearing (App. A, *infra*, p. A1) is reported at 579 F.2d 971. The opinion of the Court of Appeals (App. B, *infra*, pp. A3-A25) is reported at 573 F.2d 335. The earlier opinion of the

Court of Appeals (App. C, *infra*, pp. A26-A46) is reported at 516 F.2d 78, *cert. denied*, 424 U.S. 909. The opinion of the district court in Criminal Number 73-H-413 (App. D, *infra*, pp. A47-A52) was not reported. The opinion of the district court in Criminal Number 73-H-213 (App. E, *infra*, pp. A53-A62) is reported at 365 F. Supp. 920.

JURISDICTION

The judgment of the Court of Appeals reversing the district court's conviction of petitioner was entered on 22 May 1978. The per curiam opinion of the Court of Appeals on the Government's motion for rehearing, in which the Court reversed itself and affirmed the district court's conviction of petitioner, was entered on 5 September 1978. Timely petition for rehearing and suggestion for rehearing en banc by petitioner was denied on 16 October 1978 (App. F, *infra*, p. A63). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Defendant was indicted for embezzling certain land in violation of 18 U.S.C. § 657. After the government had presented its case-in-chief, defendant moved for and obtained a judgment of acquittal because real property could not be the subject of an embezzlement under § 657. Rather than exercise its right to appeal this midtrial termination under 18 U.S.C. § 3731 and seek a new trial, the government elected instead to let the acquittal become final. Then the government again indicted and tried defendant under 18 U.S.C. § 1006 for the identical criminal misconduct alleged in the first indictment. The question is:

Whether the Double Jeopardy Clause prohibits successive prosecutions for a single transaction under two separate statutes which proscribe the same conduct, where in the first prosecution the government allowed a midtrial termination in the defendant's favor to become final by electing to forego its right to seek reversal and a new trial through appeal?

CONSTITUTIONAL PROVISION, STATUTES, AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

That part of the Fifth Amendment to the United States Constitution which provides:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

That part of 18 U.S.C. § 657 which provides:

> Whoever, being an officer . . . of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . embezzles, abstracts, . . . or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined . . . or imprisoned . . . or both.

That part of 18 U.S.C. § 1006 which provides:

> Whoever, being an officer . . . of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . with intent to defraud the . . . institution . . . receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contracts, or any other act of any such . . . institution . . . shall be fined . . . or imprisoned . . . or both.

That part of 19 U.S.C. § 3731, as amended, which provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

That part of Federal Rule of Criminal Procedure 29(a) which provides:

> The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

STATEMENT OF THE CASE

Petitioner Kehoe was first indicted in 1973 under 18 U.S.C. § 657. In the jury trial that followed, petitioner moved at the close of the government's case for a judgment of acquittal which was granted over the government's vigorous opposition (App. E, *infra*, pp. A53-A58). *United States v. Kehoe*, 365 F.Supp. 920, 922 (S.D. Tex. 1973).

Rather than attempt an appeal under 18 U.S.C. § 3731, the government elected to let the judgment of acquittal become final, and instead obtained a second indictment under 18 U.S.C. § 1006 (App. C, *infra*, p. A30). *United States v. Kehoe*, 516 F.2d 78, 81, fn. 4 (5th Cir. 1975). The government has all along conceded that the second indictment was for the same transaction (i.e., the

identical criminal misconduct) made the subject of the first indictment, and that the evidence offered by the government to prove the second indictment was the same as that offered to prove the first indictment (Appendix to first appeal No. 74-2353, p. 58).

Petitioner moved to dismiss the second indictment arguing that he had been acquitted in the earlier trial and that a second trial arising out of the same transaction, and involving the same proof, would put him twice in jeopardy. After a hearing the district court sustained the double jeopardy contention and dismissed the second indictment (App. D, *infra*, pp. A47-A52).

The government appealed the dismissal of the second indictment pursuant to the provisions of 18 U.S.C. § 3731. The Court of Appeals, in a split decision, reversed the dismissal judgment of the district court and remanded the case for trial (App. C, *infra*, pp. A26-A46). *United States v. Kehoe*, 516 F.2d 78, *cert. denied*, 424 U.S. 909 (1976). Subsequently, petitioner was tried under this second indictment and convicted of violating § 1006.

Petitioner appealed the conviction alleging, *inter alia*, that the earlier Court of Appeals ruling on the double jeopardy issues was erroneous. The Court of Appeals agreed with petitioner in light of this Court's holding in *Finch v. United States*, 433 U.S. 676 (1977), and in light of the court's finding that application of the "different evidence" test of *Blockburger v. United States*, 284 U.S. 299 (1932) revealed § 657 and § 1006 to be so similar as to render successive prosecutions under them a violation of the Double Jeopardy Clause (App. B, *infra*, pp. A23-A25). *United States v. Kehoe*, 573 F.2d 335, 345-346 (5th Cir. 1978).

Thereafter this Court handed down its decision in *United States v. Scott*, ____U.S.____, 57 L.Ed.2d 65 (1978) expressly overruling *United States v. Jenkins*, 420 U.S. 358 (1975), and the government in a petition for rehearing convinced the Court of Appeals that the holding in *Scott* compelled vacation of its opinion that petitioner had been subjected to double jeopardy (App. A, *infra*, p. A1). United States v. Kehoe, 579 F.2d 971 (5th Cir. 1978).

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals below permitting successive prosecutions for a single transaction under two separate statutes which proscribe the same conduct, violates the Double Jeopardy Clause and is in direct conflict with *United States v. Scott*, ____U.S.____, 57 L.Ed.2d 65 (1978), *Sanabria v. United States*, ____U.S.____, 57 L.Ed.2d 43 (1978), *Fong Foo v. United States*, 369 U.S. 141 (1962), and *Blockburger v. United States*, 284 U.S. 299 (1932).

In Petitioner Kehoe's first trial under 18 U.S.C. § 657 he obtained a midtrial termination in his favor before any determination of guilt or innocence. Under the teachings of *United States v. Scott, supra*, at p. 80, the government could have appealed and sought a reversal and a new trial. Had such an appeal been successful, the ensuing new trial would not have been in violation of the Double Jeopardy Clause.

However, *Scott* does not hold or even suggest that a midtrial dismissal of a prosecution, in response to a defense motion on grounds unrelated to guilt or innocence is necessarily improper. To the contrary, *Scott* expressly recognizes that such midtrial rulings may be necessary to terminate proceedings marred by fundamental error (the very contention made by petitioner in this case). *Ibid,* at 80, n. 13.

All *Scott* gives to the government under these circumstances is the right to appeal and *seek* reversal and a new trial; it offers no guarantee that the government will get a new trial. And it would be ludicrous to argue that *Scott* permits the government, should it lose its appeal, to undertake a second prosecution for the identical criminal conduct under a second statute which proscribes the same conduct proscribed by the first statute. Such a result would obviously vitiate the Double Jeopardy Clause and thus is not permitted by *Scott,* by *Sanabria v. United States, supra,* at 62-63, by *Fong Foo v. United States, supra,* at 143, nor by *Blockburger v. United States, supra.*

Yet the holding of the Court of Appeals below upholds just such a result. Here, the government elected not to risk being rejected at the appellate level. Instead, it attempted to circumvent double jeopardy finality by letting the district court's judgment of acquittal become final, then undertook a second prosecution for the identical criminal conduct under a second statute (18 U.S.C. § 1006) which proscribes the same conduct proscribed by the first statute (18 U.S.C. § 657) (App. B, *infra,* pp. A23-A25). *United States v. Kehoe,* 573 F.2d 335, 345-346 (5th Cir. 1978).

The decision of the Court of Appeals upholding this course of action by the government not only vitiates the Double Jeopardy Clause, it mocks it.

As the Court of Appeals would have it, any time the government is not sure it can obtain a new trial on appeal and does not want to run the risk of double jeopardy finality, all the government has to do is forego an appeal, let the midtrial acquittal obtained by the defendant become final, and then the government would be free to start all over again with a second prosecution for the identical criminal conduct under a second statute proscribing the same conduct proscribed by the first statute.

It is clear that the holding of the Court of Appeals is in derogation of the Double Jeopardy Clause; it is clear that said holding is in direct conflict with the decisions of this Court cited above; it is clear that this case presents a basic conflict on a fundamental constitutional question which calls for the grant of certiorari and review by this Court.

CONCLUSION

For this reason, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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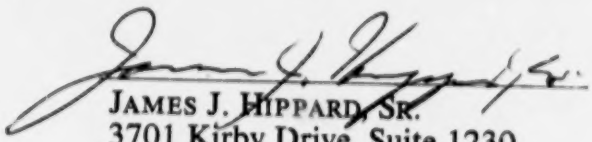
CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November 1978, three copies of this Petition for Writ of Certiorari was air mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.



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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Cornelius J. KEHOE and Ray K. Bullock,
Defendants-Appellants.

No. 76-4346.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Sept. 5, 1978.

Appeals from the United States District Court for the Southern District of Texas, SEALS, J.

On Petition for Rehearing and Petition for Rehearing En Banc

(Opinion May 22, 1978, 5 Cir., 1978, 573 F.2d 335)

Before GOLDBERG and MORGAN, Circuit Judges and WYZANSKI, District Judge.*

PER CURIAM.

In *United States v. Kehoe*, 573 F.2d 335 (5th Cir. 1978), we reviewed several alleged errors including defendants' claim that their conviction under 18 U.S.C. § 657 violated double jeopardy. While rejecting the de-

* Senior Judge for the District of Massachusetts, sitting by designation.

fendants' other contentions, we relied on *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975) to hold that the § 657 conviction abridged the Double Jeopardy Clause. Subsequently, the Supreme Court expressly overruled *Jenkins* in *United States v. Scott*, ____U.S.____, 98 S.Ct. 2187, 57 L.Ed.2d 65, 46 U.S.L.W. 4653 (1978). The portion of our opinion relying on *Jenkins*, 573 F.2d at 340-346, must be vacated in light of *Scott*. We now hold that the defendants' conviction did not violate double jeopardy and we therefore affirm the judgment of the district court.

APPENDIX B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CORNELIUS J. KEHOE and RAY K. BULLOCK,
Defendants-Appellants.

NO. 76-4346.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

May 22, 1978.

Defendants were indicted for violation of a federal statute making it illegal to make false entries in records of, or mishandling of property of, certain enumerated federal credit institutions, with intent to defraud the United States. A double jeopardy contention was sustained, but the Court of Appeals reversed and remanded 516 F.2d 78, rehearing denied 521 F.2d 815. Defendants were thereafter convicted in the United States District Court for the Southern District of Texas at Houston, Woodrow B. Seals, J., and defendants appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that: (1) dismissal of a previous prosecution for embezzlement was not a declaration of mistrial, for double jeopardy purposes, and it was irrelevant that the defendant requested the dismissal; (2) the dismissal of the previous charge was not appealable by the Government, and validity of the Government's instant prosecution under another statute was to be determined by ap-

plying traditional tests employed to decide whether same conduct could justify prosecution under two separate statutes and (3) the federal statute providing penalty for embezzlement from a federally insured institution and federal false statement statute protecting such insured institutions are not identical but are sufficiently similar that successive prosecutions offend the constitutional prohibition against double jeopardy.

Reversed.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG and MORGAN, Circuit Judges, and WYZANSKI, District Judge.*

LEWIS R. MORGAN, Circuit Judge:

Defendants Kehoe and Bullock allege several errors that they argue require reversal of their conviction for violation of 18 U.S.C. § 1006.[1] The facts allegedly

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* Senior Judge for the District of Massachusetts, sitting by designation.

1. 18 U.S.C. § 1006 states:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secetary of Agriculture acting through Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authoized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent

constituting this criminal violation are extremely complex. From 1969-1971, defendants Bullock and Kehoe were directors of the Surety Savings Association, a federally insured corporation. Surety owned a 7.2 acre tract of land in Houston on which it wanted to build an office building, but state savings and loan regulations limited the amount of money that such institutions could invest in office real estate and, therefore, these regulations prevented Surety from developing the property. Consequently, the directors of Surety formed "Fondren Square," a limited partnership, to do that which Surety could not do: develop the property. Kehoe and Bullock were general partners in Fondren (both together held a 52% interest in the partnership) with five limited partners. Surety divided the 7.2 acre tract into two sections: a 2.5 acre tract [hereinafter referred to as Phase I] and a 4.7 acre tract [hereinafter called Phase II]. Surety then conveyed Phase I to Fondren Square for a profit of $28,000, after which the latter built an office building and shopping center on the property. When the parking lot for this Phase I property was paved, however, .3 acre

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to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any exceptance, or issues, puts forth or signs any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

of Phase II, mistakenly thought to be part of Phase I, was also paved. This .3 acre figures prominently in the alleged criminal activity.

At this point Trans-Houston Corporation enters the picture. Trans-Houston was a wholly-owned subsidiary of Surety, chartered as a separate corporation and intended to act as an investment vehicle for real property. In September 1969 Surety transferred the Phase II property to Trans-Houston at cost in exchange for $395,000 in Trans-Houston stock. Surety intended Trans-Houston to enter a joint venture with Fondren Square on the Phase II tract, with Trans-Houston supplying the property and Fondren assuming all liabilities for developing the property. In November, 1969, Surety made an entry in its books transferring Phase II from its asset column to the account of Trans-Houston; the latter made the same notation in its books. Title, however, was never formally deeded to Trans-Houston. Of course, the .3 acre discussed above was included in this Phase II property, although all parties presumably thought that it was part of Phase I.

By 1970, Phase I was losing money and the Fondren partners decided to sell it. A real estate broker advised them that Phase I was not very attractive unless the undeveloped Phase II property could be sold with it. Fondren consulted with its joint venturer Trans-Houston, who decided that it would be more profitable to sell Phase II than to expend more money developing it. Thus, both phases were to be sold together.

A problem in selling the property existed, however, with regard to Phase I. That is, Phase I and another property [Hedwig property] owned by Fondren were the

subjects of a cross-collateral agreement that ran in favor of Gibralter Savings and Loan Association. This meant that if a buyer bought one of the two properties [Hedwig or Phase I], his property would still be encumbered by the debts of the other. Obviously, this cross-collateral agreement impaired the marketability of Phase I. To alleviate this problem, Fondren got Gibralter to release the two properties—Phase I and Hedwig—from the cross-collateral agreement in return for a $35,000 note executed by the limited partnership. Defendants Kehoe and Bullock signed the note individually and as general partners.

With the Phase I and Phase II properties now marketable, the real estate agent found a buyer, Triton Ventures. Triton Ventures offered to buy Phase I and take a one year option to buy Phase II. Yet, upon viewing a survey plat of the entire tract, Triton discovered that the .3 acre thought to belong to Fondren Square in Phase I was actually a part of Phase II. Triton insisted, however, that the .3 acre be included in the Phase I conveyance since it would need this area for parking at Phase I. Fondren agreed to this and in March, 1971, Fondren and Triton entered into an earnest money contract whereby Triton was to acquire Phase I and the .3 acre by paying $35,000 in cash, assuming the $900,000 note owed by Fondren on the property, and by assuming the $35,000 note owed by Fondren and defendants to Gibralter. In addition, Triton had an option to buy Phase II. The earnest money contract was signed by Kehoe and Bullock on behalf of Fondren Square. Surety, which still held the deed on Phase II, deeded the .3 acre to Triton, with Kehoe signing for Surety. Triton gave back Kehoe a deed of trust on the .3 acre to secure

payment of the note to Gibralter. Thus, if Triton did not pay the $35,000 note, it would lose the .3 acre which would revert to Gibralter Savings and Loan Association.

The contentions advanced by the Government at trial were that Surety owned the .3 acre in question.[2] Yet, Surety received no compensation for the .3 acre in that this .3 acre was conveyed to Triton in return for Triton paying off a note owed to Gibralter by Fondren and, in particular, by Kehoe and Bullock, Fondren's general partners. Accordingly, the Government contended that Kehoe, by making the unauthorized conveyance, and Bullock, by aiding and abetting in this transaction, fraudulently reaped the benefit on a sale of property that was owned by a federally insured institution. Further, the Government contended that since the minutes of Surety and Trans-Houston were silent as to the deed from Surety to Triton for the .3 acre, this meant that the Surety Board of Directors did not know of the conveyance. Accordingly, Kehoe's signature was an unauthorized conveyance made with the intent to defraud the federally insured institution and, thus, a violation of 18 U.S.C. § 1006. The Government further contended that Bullock aided and abetted this fraudulent conveyance.

[1] We have no difficulty rejecting defendants' allegations of error concerning the merits of the conviction, itself. First, defendants argue that, even assuming they committed the acts enumerated by the Government, the jurisdictional limits of 18 U.S.C. § 1006 prevent convic-

2. While all of Phase II, including the .3 acre were on Trans-Houston's books, the Government contends that the deed was kept by Surety and, thus, was its property.

tion. That is, defendants contend that if they defrauded anyone through their receipt of the $35,000 note from Triton Ventures it was Trans-Houston Corporation, the owner of the .3 acre in question and an entity not protected by § 1006. Thus, while defendants concede that record title of the .3 acre remained with Surety, they argue that Trans-Houston held equitable title, which under Texas law gives one "the present right to legal title."[3] Without exploring Texas real property law, we deem it sufficient that record title, no matter how inferior it is to equitable title, contains some value, of which value defendants' dealings with Trans-Houston deprived Surety, an entity covered by § 1006. Even assuming that Trans-Houston bore all title to the land, we cannot ignore the fact that Surety owned one hundred percent of Trans-Houston's stock or that the 4.7 acres of land were the latter's sole asset. Congress intended that § 1006, in accordance with the maxim that a servant cannot serve two masters, should prohibit a conflict of interests situation such as that which occurred here. *See Beaudine v. United States,* 368 F.2d 417 (5th Cir. 1966). Accordingly, it is difficult to assail the Government's contention that defendants contravened § 1006 because, by diminishing the value of Trans-Houston's sole asset, the defendants were necessarily decreasing the value of its stock and, accordingly, the value of a Surety asset.

[2, 3] Defendants cite *Cartwright v. United States,* 146 F.2d 133 (5th Cir. 1944) in rebuttal of the Government's position on this issue. In *Cartwright,* the Government sought to convict the defendant for a violation of what

3. Defendants cite *Pegues v. Moss,* 140 S.W.2d 461 (Tex. Civ. App. 1940) for this proposition and opine that Texas statutory law, Tex. Rev. Civ. Stat. Ann. art. 7425b-5 (1960), also "strongly suggests" this result.

was then 18 U.S.C. § 82, which made illegal the theft of any property of the United States Government *or* of a corporation in which the United States owned stock. The Government had alleged in the indictment that the defendant stole property owned by the Government, although its evidence at trial indicated that the stolen property was owned by a corporation in which the United States owned stock. This court held that the Government having chosen to allege in the indictment that the stolen property was owned by the United States, itself, could not discharge its burden of proof by showing that another entity owned the property. *Cartwright v. United States,* 146 F.2d at 135. Clearly then *Cartwright* does not in any way support defendants' argument that Trans-Houston Corporation's alleged "equitable" ownership of the .3 acre deprives § 1006 of jurisdiction over the conduct in question. *Cartwright* is potentially significant for this case only through its disapproval of the introduction of evidence that varies from that evidence anticipated by the indictment. Yet, even on this limited ground, *Cartwright* is distinguishable from the present case. In this case the indictment charged that defendants "conveyed three-tenths (3/10) of an acre of land belonging to and in the care, custody and control of Surety Savings Association."[4] Therefore, one could argue first that the allegations contained in the indictment did not vary from those proved at trial. That is, the indictment stated that the property in question was "in the care, custody, and control of Surety." Indeed, the Government proved that allegation at trial through its evidence showing that Surety owned all of Trans-Houston's stock and, thus, had effective control over disposition of the latter's assets. Of course,

4. R. p. 302.

defendants would argue that the indictment also stated that the .3 acre "belonged" to Surety and that accordingly, the evidence at trial varied from their allegation because it showed that the property "belonged" to Trans-Houston. One answer to that contention is that no matter what equitable interest Trans-Houston possessed, Surety still held record title to the property and, thus, its authorization was necessary, and indeed was sought in this case, to pass the title to Triton. Accordingly, the Government was not totally inaccurate in ascribing ownership of the property to Surety in its indictment. At any rate, even assuming a variance between the charge and proof, this court does not deem such a variance fatal unless it appears that this variance deprived the defendant of fair notice sufficient to enable him to prepare his defense. *United States v. Eaton*, 501 F.2d 77 (5th Cir. 1974); *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974), vacating 470 F.2d (5th Cir. 1972). Clearly, any variance in this case does not meet that test.

[4, 5] Defendants Bullock and Kehoe also argue that the evidence was insufficient to justify their conviction. We have examined the record and find that the Government introduced adequate evidence of defendants' guilt to uphold their convictions. In addition, we consider without merit defendant Bullock's contention that § 1006 is unconstitutionally vague. Likewise, we reject Bullock's claim that the indictment was insufficiently specific with respect to the description of the land conveyed and the benefits received. Fed. R. Crim. P. 7(c)(1) states that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The Government met that standard here.

Defendants' most troublesome argument in this case concerns the double jeopardy implication present in their prosecution. That is, the Government first tried defendants under an indictment charging violation of 18 U.S.C. § 657,[5] which makes illegal the embezzlement of money and "other things of value" from institutions insured by the Federal Savings and Loan Insurance Corporation. After a jury had been empanelled and the Government had prosecuted its case in chief, the defendants moved for a judgment of acquittal on the ground that the indictment failed to charge an offense against the laws of the United States; specifically, they argued that real property cannot be embezzled under the provisions of 18 U.S.C. § 657. The district court judge, Judge Bu[illegible], granted defendants' motion, holding that the term "embezzlement" can apply

5. 18 U.S.C. § 657 states:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

only to personal property. Shortly thereafter the Government obtained a new indictment against the defendants for the same transaction presented in the first trial; this indictment charged violation of 18 U.S.C. § 1006. Prior to trial, defendants moved to dismiss the indictment, arguing that a second trial arising out of the same transaction would place them in double jeopardy. Judge Seals, the district judge for this second indictment, granted the motion. Pursuant to 18 U.S.C. § 3731,[6] the Government

6. 18 U.S.C. § 3731 states:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

The appeal in all such cases shall be taken within thirty days

appealed the dismissal and a panel of this court, holding that a trial for the § 1006 violation would not contravene the Double Jeopardy Clause, reversed the district court order dismissing the second indictment. *See United States v. Kehoe,* 516 F.2d 78 (5th Cir. 1975), *cert. denied,* 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 313 (1976). Subsequently, defendants were tried under this second indictment and convicted of violating § 1006; it is this conviction that is the subject of the present appeal.

[6] One of defendants' major contentions upon this appeal is that, in a light of a recent Supreme Court opinion, *Finch v. United States,* 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), the prior panel's ruling on the double jeopardy issue is now erroneous and that, accordingly, this panel should affirm Judge Seals' dismissal of the second indictment. In this court an opinion in a case becomes the "law of the case" and will not be overturned by a panel in a later appeal on the same issue in the same case unless it is shown to clearly erroneous

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after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

and to work a manifest injustice. *United States v. Bedami*, 539 F.2d 440 (5th Cir. 1976); *United States v. Seiffert*, 501 F.2d 974 (5th Cir. 1974). We agree with defendants that *Finch* and another recent Supreme Court case, *Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977), do alter the analysis used by the first *Kehoe* panel; we do not agree, however, that these Supreme Court cases necessarily change the result in this case.

To explicate why we have reached this conclusion, a review of the first *Kehoe* opinion and relevant Supreme Court case law is appropriate. That panel's holding was based primarily on its "believe that a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained." 516 F.2d at 86. In reaching this determination, the panel examined recent Supreme Court pronouncements. It observed that at first glance *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975) seemed to pose an obstacle to retrial of defendants through its holding that the Double Jeopardy Clause precludes an appeal of a trial court's order, entered before a finding of guilt or innocence, that discharges a defendant based on the judge's determination that he or she cannot be convicted of the offense charged.[7] The panel noted, how-

7. In *Jenkins*, the district court, after hearing the evidence in a bench trial, dismissed an indictment charging refusal to submit to induction into the armed services. Under the law of the Second Circuit at the time of the offense, the induction order was improper and, accordingly, a person could not be convicted for refusing to submit to it. A subsequent decision, announced by the Second Circuit after the offense but before Jenkins had been charged with the crime, would allow conviction for refusal to submit to such an order. The

ever, that *Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), decided on the same day as *Jenkins*, limited the seemingly broad rule announced in *Jenkins*. For the panel, the significance of *Serfass* lay in the Supreme Court's reservation of two questions that otherwise would have fallen directly within the *Jenkins* rule. The reserved question pertinent to this case concerned whether appeal would be barred from a mid-trial ruling discharging the defendant on a legal ground that could have been raised by the defendant before trial. *See United States v. Kehoe, supra*, 516 F.2d at 84. Thus, interpreting *Jenkins* as a narrow holding limited to its facts, the panel held that it was not applicable to the case before it. Further, discovering no Supreme Court case on point, the panel determined that *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) was most analogous to the present case. In *Somerville*, the trial judge declared a mistrial when the prosecution discovered, after jeopardy had attached, that the indictment contained an incurable jurisdictional defect; the Supreme Court held that "where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been

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district court reasoned, however, that retroactive application of the intervening decision would be unfair. For this reason, and without entering any finding of guilt or innocence, the court dismissed the indictment. *United States v. Jenkins*, 349 F.Supp. 1068 (E.D. N.Y. 1972). Ruling upon the issue of whether the Government could appeal this order of dismissal, the Supreme Court held that such an appeal would violate the Double Jeopardy Clause. The Court reasoned that the proceedings in the trial court had terminated in the defendant's favor and, consequently, a Government appeal that, if successful, would require another trial to determine factual issues relating to the elements of the charge would violate the Double Jeopardy Clause. *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975).

upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." 410 U.S. at 471, 93 S.Ct. at 1074, 35 L.Ed.2d at 435. Accordingly, holding that despite the different terminology used to abort the first trial in *Somerville* and in the instant case, the effect was the same in both, the panel employed the interest-balancing approach used in *Somerville* and permitted a second prosecution. 516 F.2d at 85. In short, the panel having reasoned that *Jenkins*, limited by *Serfass*, did not control, it analyzed the dismissal as a mistrial and because this mistrial implemented a "reasonable state policy," it permitted a second prosecution.[8]

Defendants now contend that *Finch v. United States*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), decided after *Kehoe*, changes the result in the latter case. As noted above, we believe that *Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977) and *Finch v. United States*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed. 2d 1048 (1977), alter the reasoning employed by this court in its original opinion on this question. That is, in this case the Government did not appeal the district court's dismissal of the indictment charging a § 657 violation. Rather, it brought a new indictment, charging a

8. Assuming that the dismissal could have been analyzed as a mistrial, see discussion, *infra*, slip opinion at pp. _____-_____ at pp. 4324-4327, the panel's conclusion that a second trial would not be prohibited by the Double Jeopardy Clause, was ratified by the Supreme Court in *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). In *Dinitz*, the Court held that when a defendant successfully moves for a mistrial and the error that necessitates the mistrial is not attributable to prosecutorial or judicial bad faith or overreaching, a second trial for the same offense does not contravene the Double Jeopardy Clause. *Dinitz*, 424 U.S. at 607, 96 S.Ct. 1075.

violation of § 1006. The first *Kehoe* panel decided the case under the assumption that the result on the double jeopardy issue would be the same whether the Government has appealed the § 657 dismissal or, as actually happened, had brought an indictment under another statute. Accordingly, it analyzed the case as if the Government were appealing the dismissal of the § 657 indictment and seeking a retrial on that charge should its appeal be successful. *See Kehoe,* 516 F.2d at 81 n.4 and at 84 n.8. Yet, *Lee* and *Finch* clearly indicate that the Double Jeopardy Clause would prevent an appeal of the original indictment charging a violation of § 657. In *Finch,* the Government charged the defendant with knowingly fishing on a portion of a river reserved for use by the Crow Indians in violation of 18 U.S.C. § 1165. The district court reviewed the applicable treaties and dismissed the information for failure to state an offense under the statute in that the relevant treaties indicated that the land on which the defendant was fishing was not held by an Indian group. The Supreme Court held that the Double Jeopardy Clause prevented the Government from appealing the dismissal "[b]ecause the dismissal was granted prior to any declaration of guilt or innocence, 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged.' " *Finch,* 433 U.S. at 677, 97 S.Ct. at 2910, 53 L.Ed.2d at 1051, citing *Lee v. United States,* 432 U.S. at 23, 97 S.Ct. at 2141, 53 L.Ed.2d at 80.

Lee is signifiicant for this case because of its explication of the *Jenkins* holding. In *Lee,* the defendant had been charged with theft of some wallets in a United States Post Office in violation of the Assimilative Crimes Act, 18 U.S.C. § 13. Immediately before trial, the defense

counsel moved to dismiss the indictment as defective in that an essential element of the offense—the intent to steal—was omitted from the indictment. Because the court had had no prior opportunity to consider the motion, it began the bench trial, reserving its decision on the motion. After both the prosecution and the defense had rested, the court ruled that although the defendant's guilt had been proven beyond a reasonable doubt, it found the indictment defective and granted the motion to dismiss. In analyzing the Double Jeopardy Claim, the Supreme Court reexamined *Jenkins, supra,* and reemphasized the importance of the distinction drawn between a mistrial and a dismissal. In *Jenkins,* the Court had stated that it was of critical importance to its determination that Jenkins could not be retried that the proceeding in the trial court had terminated in the defendant's favor rather than in a mistrial. *Lee v. United States,* 432 U.S. at 30, 97 S.Ct. at 2146, 53 L.Ed.2d 80. The Court noted that

> [t]he distinction drawn by *Jenkins* does not turn on whether the District Court labels its action a 'dismissal' or a 'declaration of mistrial.' *The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged.* A mistrial ruling invariably rests on grounds consistent with reprosecution, . . . while a dismissal may or may not do so. *Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins* establishes that further prosecution is barred by the Double Jeopardy Clause.

432 U.S. at 30, 97 S.Ct. at 2146, 53 L.Ed.2d at 87 (emphasis added). Applying this standard to the case before it, the Court held that

> the proceedings against Lee cannot be said to have terminated in his favor. The dismissal clearly was not predicated on any judgment that Lee could never be prosecuted or convicted for the theft of the two wallets. To the contrary, the District Court stressed that the only obstacle to a conviction was that the fact that the information had been drawn improperly. The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant. And there can be a little doubt that the court granted the motion to dismiss in this case in contemplation of just such a second prosecution. In short, the order entered by the District Court was functionally indistinguishable from a declaration of mistrial.

Lee, 432 U.S. at 30, 97 S.Ct. at 2146, 53 L.Ed.2d at 87 (footnote omitted). Having determined that this proceeding had ended in a mistrial, the Court applied the rule articulated in *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267,[9] and held that the defendant having made the motion for a mistrial, he is estopped from claiming the protections of the Double Jeopardy Clause in a subsequent trial for the same offense.

[7] In the present case, the district court clearly did not intend its dismissal of the § 657 indictment as a declaration of mistrial. The error that necessitated the court's dismissal was not a simple defect in the indictment that, as in *Lee*, could be cured by redrawing the instrument to include an essential element that was omitted in the first indictment. Rather the order of dismissal was grounded on the court's determination that the Government's theory of the case—the real property

9. See n. 8, *supra*.

can be embezzled or misapplied under § 657—could never be proved by any set of facts nor by any amendment of the indictment; its indictment quite simply stated no offense prohibited by § 657. Unlike the order in *Lee*, the district court's order here contemplated no second prosecution for this § 657 offense.[10] Accordingly, the order of dismissal did constitute a termination of the proceedings in the defendant's favor and a determination by the district court, whether correct or not, that the "defendant simply [could] not be convicted of the offense charged."

Therefore, because we conclude that the district court's order of dismissal should be considered as a dismissal, not as a mistrial, under the *Jenkins* test, we do not consider the second part of the *Lee* opinion, relating to the defendant's "waiver" of his right to object to a second trial if he requested the mistrial and if neither the Government nor the court has acted in bad faith. That is,

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10. The Government argues that, as in *Lee*, the order of dismissal here did not contemplate that defendants Kehoe and Bullock could not be convicted of some offense, although not 18 U.S.C. § 657. Yet, in *Lee*, the court's mid-trial dismissal was labeled a mistrial because the court anticipated reprosecution for the same offense charged in the indictment that was being dismissed there. In this case, the district court clearly did not envision reprosecution for the § 657 charge as a result of its dismissal. Even if the court expected retrial of defendants for some other offense—and that is nowhere indicated in its order—that expectation in no way negates the court's determination that defendant could not be convicted for a § 657 violation. Indeed, in *Finch v. United States*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048, discussed *supra* slip opinion at _____, at 4324, the district court dismissed an information that charged a violation of 18 U.S.C. § 1165 as failing to state an offense. The Supreme Court held that the Double Jeopardy Clause prevented an appeal of this dismissal. Thus, simply because the district court's dismissal did not preclude another prosecution under another statute for the same conduct did not alter the Government's inability to appeal the dismissal itself.

the Government argues that *Lee* is helpful to their argument in that it holds that whenever a defendant exercises a choice in favor of termination, rather than continuation, of the trial, *Dinitz* principles[11] control and the defendant is estopped from objecting to a second trial. The Government ignores, however, the Supreme Court's insistence that one must first find that the district court's termination of the case constitutes a declaration of mistrial, before one can apply this *Dinitz* waiver-like concept. Here, as discussed above, it is clear that the district court did not intend its order of dismissal as a mistrial. Accordingly, it is irrelevant that the defendant requested the dismissal.

[8, 9] Similarly, the Government might argue that conceding the above discussion to be correct, *Lee* does not alter this court's first opinion in this case under the "clearly erroneous" standard in that the basis for the panel's decision—that one who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before jeopardy attached—was not touched upon by the Supreme Court in *Lee*. It is true that the Court did not address this precise question in *Lee*. Nevertheless, its discussion of the *Jenkins* decision indicates that the timing of the defendant's motion to dismiss is not the threshold question. That is, in *Lee*, the defendant delayed making a challenge of the indictment that could have been made before trial until after jeopardy had attached.[12] The Court's first question, how-

11. See n. 8.

12. In *Lee*, defendant made his motion to dismiss immediately before the trial began. Nevertheless, after determining that the court's dismissal was indeed a mistrial, the Supreme Court deemed the defendant's motion to dismiss as having been made after jeopardy had attached, in that the defense counsel gave the court little opportunity to consider the motion before jeopardy had attached, he

ever, was whether the termination of the trial envisioned a second prosecution for the offense after the defective indictment had been corrected or whether the dismissal was grounded instead on the conclusion, correct or not, that the defendant simply could not be convicted of the offense charged. Clearly, had the Court found that the case had finally ended in Lee's favor, it would not have considered probative the failure of Lee to make the motion to dismiss until after jeopardy had attached.

Having determined that *Lee* and *Finch* would prevent the Government's appeal of the dismissal of the § 657 indictment, the validity of the Government's subsequent prosecution of the § 1006 charge must be determined by applying the traditional tests employed to decide whether the same conduct can justify prosecution under two separate statutes. In order to determine whether a given act can be tried as a violation of two separate statutes we employ the "different evidence" test formulated by the Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). That is, if each statute requires proof of a fact and element that the other statute does not require, then successive trials of a person for conduct allegedly violating both statutes does not violate the Double Jeopardy Clause. *Brown v. Ohio,* 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *United States v. Ewell,* 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627; *United States v. Hill,* 500 F.2d 733 (5th Cir. 1974). *United States v. Costello,*

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made no effort to withdraw the motion after jeopardy had attached, and he offered no objection to the termination of the proceedings before a finding of guilt or innocence had been entered. *Lee v. United States,* 432 U.S. 23, 33, 97 S.Ct. 2141, 2147, 53 L.Ed.2d 80, 89 (1977).

483 F.2d 1366 (5th Cir. 1973); *United States v. Young*, 482 F.2d 993 (5th Cir. 1973); *Hattaway v. United States*, 399 F.2d 431 (5th Cir. 1968). In applying this standard, however, we are mindful that this is not a standard of mathematic precision. In *Brown, supra*, the Supreme Court recognized this limitation: "It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition." 432 U.S. at 164, 97 S.Ct. at 2224, 53 L.Ed. at 187. The statutes themselves are the prime sources for this analysis. By first resolving the statutes into their constituent elements, and then comparing the elements, along with their probable judicial glosses, the double jeopardy issue may be analyzed.

[10] Resolved into its elements § 657 provides:

> (1) Whoever, being an officer . . . of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation
>
> (2) embezzles, abstracts, or willfully misapplies
>
> (3) any moneys, funds, credits, securities, or other things of value belonging to such institution,
>
> shall be fined or imprisoned or both.

In the same fashion, § 1006 contains the following four elements:

> (1) Whoever, being an officer . . . of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation
>
> (2) with intent to defraud the . . . institution receives directly or indirectly

> (3) any money, profit, property, or benefits
>
> (4) through any transaction, loan, commission, contract, or any other act of any such . . . institution,
>
> shall be fined or imprisoned or both.

Even though the sections employ different language, we are persuaded that both statutes proscribe the same conduct with the exception of the § 1006 requirement that an act of the institution be involved. The first and third elements of both are nearly identical. The second elements, the scienter requirements, although employing different language, are broad enough to be construed to proscribe the same peculations. Although § 1006's fourth element has no analog in § 657, the *Blockburger* test is not thereby satisfied because *each* statute must contain an element that the other does not and Section 657 contains no element not present in § 1006. We therefore, hold that § 657 and § 1006, although not identical because of the § 1006 "act of the institution" requirement, are sufficiently similar that successive prosecutions under the statute offend the constitutional prohibition against double jeopardy.

REVERSED.

APPENDIX C

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

Cornelius J. KEHOE and Ray K. Bullock,
Defendants-Appellees.

NO. 74-2353.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

July 16, 1975.

Defendants were charged with embezzling certain land from a savings association in violation of federal statutes. After the government had presented its case-in-chief, a motion for "judgment for acquittal" on the ground that the indictment failed to charge an offense against the United States in that real property could not be the subject of an embezzlement was granted by judgment expressly denominated an acquittal rather than a dismissal of indictment. Defendants were thereafter indicted for the same transaction, but for violation of a federal statute making it illegal to make false entries in the records of, or mishandling of property of, certain enumerated federal credit institutions, with intent to defraud the United States. A double jeopardy contention was sustained by the United States District Court for the Southern District of Texas at Houston, Woodrow B. Seals, J., and the United States appealed. The Court of Appeals, Thornberry, Circuit Judge, held that a defendant who for reasons of trial tactics delays until mid-trial a challenge

to indictment that could have been made before trial, and before jeopardy has attached, is not entitled to claim protection of the double jeopardy clause when his objections to indictment are sustained.

Appeal from the United States District Court for the Southern District of Texas.

Before, BELL, THORNBERRY and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

Presented for decision in this § 3731 appeal is a question expressly left open by the Supreme Court in its recent double jeopardy trilogy. In Serfass v. United States, 1975, ___ U.S. ___, 95 S.Ct. 1055, 43 L.Ed.2d 265, the Court declined to "intimate any view concerning the case put by the Solicitor General, of 'a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to the trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" ___ U.S. at ___, 95 S.Ct. at 1065, 43 L. Ed.2d at 277. In this case we conclude, first, that Kehoe and Bullock allowed themselves to be placed in jeopardy for tactical reasons, and second, that because of their decision they are not entitled to claim the protection of the double jeopardy clause. Accordingly, we assume jurisdiction of the appeal and reverse the judgment of the district court.

I.

On January 18, 1973 the grand jury named appellees in an eleven-count indictment charging a number of per-

sons with participation in an alleged loan kickback scheme. On May 14, 1973 a superseding eleven-count indictment was handed down by the grand jury. This indictment, as well as the one that it superseded, alleged violations of 18 U.S.C. § 1006.[1] Also on May 14, however, Kehoe and Bullock alone were charged in a single count indictment with embezzling certain land from a savings association in violation of 18 U.S.C. § 657.[2] Appellees pleaded not guilty to the embezzlement charge, and on October 29, 1973 a jury was empanelled and trial began. After the government had presented its case-in-chief, appellees moved for a "judgment of acquittal" on

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1. Section 1006 renders illegal the making of false entries in the records of, or the mishandling of the property of, certain enumerated federal credit institutions, with the intent to defraud the United States.

2. Section 657 provides:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or wilfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

the ground, inter alia, that the indictment failed "to charge an offense against the laws of the United States of America since real property cannot be the subject of an embezzlement under the provisions of Title 18, United States Code, Section 657." In a memorandum opinion reviewing the permissible reach of § 657, Judge Bue announced his decision to grant appellees' motion "on the grounds that the indictment failed to state an offense against the United States of America."[3] Shortly thereafter the government procured a new indictment against appellees for the same transaction made the subject of the previous indictment; this time, however, the grand jury charged Kehoe and Bullock with a violation of 18 U.S.C. § 1006. Appellees promptly moved to dismiss this indictment, arguing, inter alia, that Judge Bue had acquitted them in the earlier trial and that a second trial arising out of the same transaction would put them twice in jeopardy. After a hearing, Judge Seals sustained the double jeopardy contention and dismissed the second indictment. The United States now seeks to appeal that ruling.

[1] The government may appeal an adverse judgment in a criminal case only when authorized by statute. United States v. Sanges, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445. 18 U.S.C. § 3731 provides that:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

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3. The correctness of this ruling is not before us.

Here Judge Seals dismissed the second indictment because he felt that after Judge Bue's ruling on the first indictment, the double jeopardy clause barred further prosecution. Hence, our resolution of the double jeopardy issue will control not only the jurisdictional question but the merits as well.[4] With that in mind, we proceed to the main issue on appeal: Does the double jeopardy clause bar the government from further prosecuting Kehoe and Bullock?

II.

[2] Judge Bue expressly denominated his judgment an acquittal, rather than a dismissal of the indictment. Nevertheless, although "[i]t is, of course, settled that 'a verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense.' . . . [t]he word [acquittal] . . . has no talismanic qualities for purposes of the Double Jeopardy Clause." Serfass v. United States, *supra*, ____ U.S. ____, 95 S.Ct. at 1064, 43 L.Ed.2d at 276. In short, as the Supreme Court noted in a related context, "the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction." United States v. Jorn, 1971, 400 U.S. 470, 478 n.7, 91 S.Ct. 547, 553 n.7, 27 L.Ed.2d 543, 552 n.7. It follows that we must examine Judge Bue's

4. The case is in its present posture because the government, rather than appealing Judge Bue's ruling, chose to reindict appellees under a different statute. Hence, the constitutional double jeopardy question that we would have addressed as a jurisdictional matter had Judge Bue's order been appealed was instead presented to Judge Seals as an argument on the merits for dismissing the second indictment. Nevertheless, even Judge Seals' judgment would not be appealable if "the double jeopardy clause of the United States Constitution prohibits further prosecution" of Kehoe and Bullock. Hence, in this situation the merits and the jurisdictional question merge.

ruling and properly characterize it for purposes of the double jeopardy clause.

[3] Kehoe and Bullock were of course not acquitted on the general issue by the jury. The primary factfinder made no determination of their guilt or innocence. In certain circumstances, however, the trial judge even in a jury trial may find facts in a manner that will, by a doctrine similar to collateral estoppel, act as an acquittal.[5] Thus, if Judge Bue based his ruling upon facts that went to the general issue of the case, Kehoe and Bullock were in substance, as well as in name, acquitted. The constitutional rule against further prosecution after an acquittal would then come into play to prevent us from assuming jurisdiction.[6]

A reading of Judge Bue's opinion reveals that except perhaps for one brief passage he was clearly discussing only the legal sufficiency of the indictment and not the facts of the case before him. Hence, appellees' argument

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5. United States v. Sisson, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608; United States v. Jorn, *supra*, 400 U.S. at 478 n. 7, 91 S.Ct. at 553, n. 7, 27 L.Ed.2d at 552 n. 7. *See also* Note, Government Appeals of "Dismissals" in Criminal Cases, 87 Harv. L. Rev. 1822 (1974).

Although the Supreme Court in United States v. Wilson, ____ U.S.____, 95 S.Ct. 1013, 43 L.Ed.2d 232 read *Sisson* as a statutory rather than a constitutional decision for purposes of reviewability on appeal, *Wilson* noted and apparently approved *Sisson's* suggestion (399 U.S. at 290 & n. 18, 90 S.Ct. at 2129 & n. 18, 26 L.Ed.2d at 624 & n. 18) that the trial judge's ruling in that case posed a constitutional bar to further *trial* proceedings against Sisson. ____ U.S. at ____, 95 S.Ct. at 1025-26, 43 L.Ed.2d at 246.

6. This case is not like *Sisson* or *Wilson;* reversal on appeal would mean that appellees' second trial could go forward. Thus, if Judge Bue's judgment was an acquittal, the double jeopardy clause would prohibit further proceedings against Kehoe and Bullock, *see* note 5 *supra,* and we would be required to dismiss the appeal.

on this point turns entirely on one ambigious statement, quoted below:

> This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for the purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is a fine one, it is one that is critical to the offense of embezzlement.

App. at 265. Appellees apparently contend that Judge Bue found that, if other evidence had been introduced, the prosecution could have obtained a conviction under the indictment as it then stood, despite the fact that it alleged embezzlement of real property. The government argues, on the other hand, that this passage was simply a hypothetical situation posited by the trial judge in which the defendants could properly have been indicted under 18 U.S.C. § 657. We think that the government is essentially correct.

[4] First, it is doubtful whether the judge intended to make findings of fact; he clearly states that certain facts will simply be "accepted as true for purposes of this motion." Second, Judge Bue concluded only that "an indict-

ment alleging embezzlement might have been proper," and not that an indictment alleging embezzlement of *land* might be permissible. Therefore, even if he did intend in this passage to make formal findings, the resulting comments were not necessary to the stated ground for granting appellees' motion—i.e., that the indictment in question failed to state an offense—and thus do not constitute findings of fact binding on this court. *Compare* United States v. Esposito, 7 Cir. 1974, 492 F.2d 6, 9, cert. denied 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 760 (1974),[7] *with* United States v. Sorenson, 7 Cir. 1974, 504 F.2d 406; United States v. Jaramillo, 8 Cir. 1975, 510 F.2d 808. In these circumstances Judge Bue's ruling can only be characterized as purely legal—and hence not an acquittal. There was no conclusion on innocence or guilt. Consequently, since the rule forbidding further proceedings after an acquittal is inapplicable here, we must now consider whether the double jeopardy clause prohibits further prosecution of defendants who procure the mid-trial dismissal of the indictment on the ground that it fails to state an offense.

III.

The recent Supreme Court double jeopardy triology does not supply a direct answer. In United States v. Wil-

7. "[I]t is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. *The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment*" (emphasis added).

son, 1975, ____U.S.____, 95 S.Ct. 1013, 43 L.Ed.2d 232, the trial judge dismissed the indictment on speedy trial grounds after a jury had found Wilson guilty of converting union funds to his own use. Relying on United States v. Sisson, *supra,* the Court of Appeals rebuffed the government's attempt to appeal that ruling. The Supreme Court reversed. Justice Marshall carefully reviewed the legislative history of the new § 3731 and concluded that "Congress was determined to avoid creating nonconstitutional bars to the Government's right to appeal." ____ U.S. at ____, 95 S.Ct. at 1019, 43 L.Ed. 2d at 239. Proceeding then to an examination of the scope of the double jeopardy clause, the Court isolated "the prohibition against multiple trials as the controlling constitutional principle." ____ U.S. at ____, 95 S.Ct. at 1023, 43 L.Ed.2d at 243. Since in the case before it reversal on appeal would result only in reinstatement of the jury verdict and not in a new trial, the court concluded that the double jeopardy clause would not be offended by permitting the appeal.

[5] In United States v. Jenkins, 1975, ____ U.S. ____, 95 S.Ct. 1006, 43 L.Ed.2d 250, the defendant was indicted for knowingly refusing to submit to induction into the armed forces. After a bench trial the court "dismissed the indictment" because the Board had—erroneously under then-existing law—refused to entertain Jenkins' "late-ripening" claim to conscientious objector status. The government sought to appeal this ruling, claiming that the district judge erred in refusing to give retroactive effect to a Supreme Court decision that legitimated the Board's refusal but which was handed down after Jenkins declined induction. The Court of Appeals dismissed for lack of jurisdiction, and the Supreme Court affirmed.

The Second Circuit had characterized the district court's judgment as an acquittal. The Supreme Court was less sure, and noted the difficulty in bench trials of determining whether a judgment discharging the defendant rested upon factual or legal grounds. Nevertheless, the Court was reasonably certain that the trial judge had not found all factual issues *against* the defendant. Thus, the case before them was not, like *Wilson*, where reversal and remand would lead only to reinstatement of a guilty verdict. In deciding that the double jeopardy clause would forbid further proceedings against Jenkins the Court articulated this standard:

> Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.

___ U.S. at ___, 95 S.Ct. at 1013, 43 L.Ed.2d at 259. At first glance the broad rule stated here would appear to require dismissal of the present appeal. We have before us a judgment discharging the defendants, and if it is reversed, further proceedings devoted to resolution of factual issues going to the elements of the offense charged will be necessary.[8] Nonetheless, the final case of the double

8. For purposes of the double jeopardy clause it is of no significance that appellees were originally indicted under 18 U.S.C. § 657 and are now under indictment for violation of 18 U.S.C. § 1006. Both indictments arise out of the same factual setting; all that has changed is the prosecution's legal theory.

jeopardy trilogy strongly implies that the *Jenkins* standard is not as sweeping as it first appears.

In Serfass v. United States, *supra,* the district court, granted the defendant's pre-trial motion to dismiss the indictment on the legal ground that the Selective Service Board had erred in its handling of Serfass's claim to conscientious objector status. The Court of Appeals decided that the government could appeal this order and reversed on the merits. The Supreme Court affirmed, holding that since Serfass had never waived his right to a jury trial, the district judge had made his ruling before Serfass had been placed in jeopardy and hence the double jeopardy clause had no application. Most significant for present purposes, however, the Court reserved two questions not necessary to decision of the case before it: (1) "whether a similar ruling [to the one actually made in *Serfass*] by the district court *after jeopardy had attached* would have been appealable," (emphasis added), and (2) whether appeal would be barred from a mid-trial ruling discharging the defendant on a legal ground that could have been raised by the defendant before trial. ___ U.S. at ___, 95 S.Ct. at 1065, 43 L.Ed.2d at 277-78. The implication that these might be open issues is important, because both hypothetical cases seem to fall directly within the *Jenkins* rule. If a legal bar to further proceedings is raised by the defendant after jeopardy has attached, a judgment sustaining the objection would result in the defendant's discharge, and upon reversal and remand new factual inquiries would perforce be made. Yet the Supreme Court treated the *Serfass* hypotheticals as controversies for another day and not as cases clearly controlled by *Jenkins.* Consequently, it seems likely that the Court intended *Jenkins* to be limited to its

facts: a bench trial terminated by a ruling that—since it may have been one in fact—must be treated as an acquittal for purposes of the double jeopardy clause.[9] Thus, none of the recent Supreme Court cases controls here.

[6-8] Accordingly, we must make an independent analysis of whether the double jeopardy clause prohibits further proceedings against appellees. Double jeopardy considerations first come into play when jeopardy attaches; in a jury trial attachment occurs when the jury is empanelled and sworn. Serfass v. United States, *supra*, ____ U.S. at ____, 95 S.Ct. at 1062, 43 L.Ed.2d at 274. In this jury case jeopardy had clearly attached: the trial judge ruled on the indictment at the close of the government's case-in-chief. Nevertheless, "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Illinois v. Somerville, 1973, 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425, 433, quoted in Serfass v. United States, *supra*. *See also* United States v. Sisson, *supra*, 399 U.S. at 303, 90 S.Ct. at 2137, 26 L.Ed.2d at 631; United States v. Pecora, 3 Cir. 1973, 484 F.2d 1289, 1294 n. 7; Note, *supra* note 5, at 1836. Of course, once jeopardy has attached, a judgment that either is or may be, an "acquittal on the merits" bars further proceedings. The Supreme Court has already weighed the various considerations raised in this context and come down on the side of the defendant. United States v. Wilson, *supra*, ____ U.S. at ____, 95 S.Ct. at 1026, 43 L.Ed.2d at 246. We have determined, however, that Judge Bue's ruling in this case was not an acquittal. What we must decide, then, is whether a judgment discharging

9. *But see* United States v. Means, 8 Cir. 1975, 513 F.2d 1329.

the defendant after jeopardy has attached on the ground that the indictment is incurably defective poses the same constitutional obstacle to a second trial that is supplied by an actual or an apparent acquittal.

[9] The Supreme Court case most nearly resembling this one is Illinois v. Somerville, supra. In *Somerville* the trial judge had declared a mistrial when the prosecution discovered, after the jury had been empanelled and sworn but before any testimony had been taken, that the indictment contained an incurable jurisdictional defect. Distinguishing, inter alia, an earlier defective indictment case[10] on the basis that there the first trial had resulted in a verdict of acquittal by the jury, the Court held that "where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." 410 U.S. at 471, 93 S.Ct. at 1074, 35 L.Ed.2d at 435. Despite the different terminology used to abort the first trial in *Somerville* and the first trial here, the effect was the same—the dismissal of the indictment and the bringing of a new prosecution—and we believe that the interest-balancing approach employed in that case is also appropriate in this one.[11] *See* United States v. Mayes, 6 Cir.

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10. United States v. Ball, 1896, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300.

11. In United States v. Jenkins, *supra*, the Supreme Court expressly disapproved the reasoning of the dissenting judge in the Court of Appeals, who argued that *Sommerville*-type balancing is appropriate even in cases where the defendant has been acquitted: "We disagree with this analysis because we think it is of critical importance whether the proceedings in the trial court terminate in a

1975, 512 F.2d 637, 651-52; Comments, Double Jeopardy and Government Appeals of Criminal Dismissals, 52 Texas L.Rev. 303, 342 & n. 180; *cf.* Note, *supra* note 5, at 1838-40.

[10-13] Two factors make this case stronger for the defendants than Somerville. First, Kehoe and Bullock sat through a full day of trial, at which the prosecution presented its evidence against them. Second, the trial judge termed his decision an acquittal, rather than a mistrial, and the defendants could reasonably have believed that the government was barred from proceeding further against them; the possible psychological shock of being reindicted is not immaterial to traditional double jeopardy considerations. What we think controlling for double jeopardy purposes, however, is the manner in which this case is *less* strong for the defendants than *Somerville*. In the latter case the defendant objected strenuously to the termination of the first trial. Here, on the other hand, the defendants themselves challenged the indictment, but only after the jury had been sworn and the government had presented its case-in-chief. At oral argument counsel for appellees stated that he waited to make his "motion for acquittal" because he wanted an opportunity to view the government's evidence. We believe that a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy

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mistrial as they did in the *Sommerville* line of cases, or in the defendant's favor, as they did here." _____U.S. at _____ n. 7, 95 S.Ct. at 1010 n. 7, 43 L.Ed.2d at 256 n. 7. Read in context, it seems plain that this language refers only to cases where the defendant was, or may have been, acquitted on the merits. We have already decided that ours is not such a case.

clause when his objections to the indictment are sustained.[12] *Cf.* United States v. Serfass, *supra*, ____U.S. at ____, 95 S.Ct. at 1065, 43 L.Ed.2d at 277-78; United States v. Jenkins, 2 Cir. 1973, 490 F.2d 868, 880. The Senate Report on the bill to amend old § 3731 reveals that Congress believed that the double jeopardy clause would not bar further proceedings in this type of case. S.Rep. No. 91-1296, 91st Cong., 2d Sess., 7, 8-12 (1970). *See also* United States v. Wilson, *supra*. In fact, the old statute's failure to permit a government appeal in cases like this one appears prominently in the Report as a reason for amendment. Under the flexible, interest-balancing approach of Illinois v. Somerville we think that the double jeopardy clause does not forbid further proceedings against appellees; the new § 3731 thus achieves one of the intended purposes. Accordingly, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.[13]

Reversed and remanded.

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12. Fed. R. Crim. P. 12(b)(2) is not violated by this holding. That rule states, in pertinent part: "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Although the rule removes the threat of procedural waiver with regard to jurisdictional defenses, it does not purport to prohibit courts from attaching other unfavorable consequences to the decision to withhold a motion until the middle of the trial.

13. There is no merit in appellees' additional contention that the pattern of government behavior toward them constitutes bad faith harassment in violation of the due process clause. *See* United States v. McGough, 5 Cir. 1975, 510 F.2d 598, 603-05.

BELL, Circuit Judge (dissenting):

Being of the view that jeopardy attached by virtue of the judgment of acquittal entered in the prior trial of defendants, and that Rule 12(b)(2), F.R.Crim.P., prevents defendants from being barred from claiming double jeopardy because of their delay in challenging the indictment, I would dismiss the government's appeal. I therefore respectfully dissent.

Defendants-appellees Kehoe and Bullock were indicted in 1973 under 18 U.S.C.A. § 657 for the offense of embezzling real property. The case proceeded to trial and at the close of the government's case-in-chief both defendants moved for a judgment of acquittal under Rule 29 F.R.Crim.P. on several grounds, one being that the indictment failed to charge an offense. They argued that real property could not be embezzled and that no case of embezzlement of any property had been established by the government's evidence. The district court granted this motion, agreeing with defendants on both points.

A second indictment was then obtained charging these same defendants with fraudulently receiving the benefits of a federally insured savings association transaction in violation of 18 U.S.C.A. § 1006. This indictment related to the same criminal misconduct alleged in the indictment previously dismissed, and the evidence to have been offered was also the same. Defendants moved to dismiss this second indictment on the grounds that jeopardy had attached in the prior proceeding. This motion was granted and the government now appeals.

The government contends that the judgment of acquittal in the first proceeding was in fact a dismissal of the indictment for failure to charge an offense. It is ar-

gued that the district court did not reach the merits of the case, that there was no verdict in defendants' favor, and that therefore no jeopardy attached. I find no substance in these contentions. It appears that the district court did consider the evidence presented and therefore went beyond the face of the indictment in its ruling:

Recent United States Supreme Court decisions make it clear that principles of double jeopardy bar subsequent reprosecution once a case has terminated in defendant's favor based upon factual conclusions not found in the indictment but instead upon evidence adduced at trial. United States v. Jenkins, 1974, ____U.S.____, 95 S.Ct. 1006, 43 L.Ed.2d 250. *See also* Serfass v. United States, 1975, ____U.S.____, 95 S.Ct. 1055, 43 L.Ed.2d 265; United States v. Wilson, 1975, ____U.S.____, 95 S.Ct. 1013, 43 L.Ed.2d 232. The first question then is whether the trial court relied on such evidence in its determination. The district court in the second proceeding answered this question in the affirmative and I agree.

The critical language of the court in the first proceeding is as follows:

> This Court was aware of and concerned with the fine distinctions being made when the motions for judgment of acquittal was urged by defendants at the close of the Government's case. *Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper.* However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged con-consideration never was intended to flow to Surety but only to the defendants. Although the defendants

> ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is a fine one, it is one that is critical to the offense of "embezzlement." (Emphasis added)

Thus it appears that the court found that the government had not put on sufficient evidence to sustain a conviction of embezzlement since embezzlement could not be of real property and the government failed to show that any personal property had been taken in the transaction.

Jenkins, supra, is controlling where, as here, facts adduced after defendants were put on trial before a trier of facts were considered in dismissing the indictment. ____U.S. at____, 95 S.Ct. 1006, 43 L.Ed.2d at 259. Jeopardy attaches, according to *Serfass,* when a defendant is put to trial before the trier of the facts. ____ U.S. at ____, 95 S.Ct. 1055, 43 L.Ed.2d at 274. This rule, according to *Jenkins,* includes a case where an indictment is dismissed by utilizing facts developed in that trial in connection with the dismissal although the trial did not reach the point of a verdict or judgment. ____U.S. at ____, 95 S.Ct. 1006, 43 L.Ed.2d at 259. Such facts were utilized here.[1]

The opinion prepared by Judge Thornberry, as I perceive it, recognizes that *Jenkins,* without more, would control the disposition of this appeal and require affirm-

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1. In both *Jenkins* and the present appeal, it is unclear whether the district judge terminated the trial based upon factual or legal conclusions. In both cases, however, the judge apparently relied at least in part upon the facts as developed, and thereupon concluded the trial. The court in *Jenkins* held that retrial of the defendant in such a posture would place him twice in jeopardy. I see the posture of the present case as requiring an identical result.

ance. *Jenkins* is avoided, however, by deciding and applying the reserved hypothetical of *Serfass,* thus necessitating a balancing test with the result of estopping defendants from asserting a double jeopardy defense. This approach, in my judgment, misconstrues the reserved question in *Serfass,* decides it incorrectly as construed, and denies a constitutional right because of delay in the fact of Rule 12(b)(2).

The issue then is whether defendants are barred from claiming double jeopardy under the circumstances because they could have but did not challenge the indictment until the close of the government's case-in-chief. They could have questioned the indictment before trial by a motion to dismiss for failure to charge an offense under Rule 12(b)(2).[2] The same rule, however, provides that such a failure may be noticed by the court at any time. Defendants chose to wait until the close of the government's case-in-chief to make their motion and the court took notice of it. At that point, the sufficiency of the evidence was drawn into issue with respect to the validity of the indictment.

In *Serfass, supra,* the Supreme Court saved the question of the government being denied a right to appeal by the strategy of a defendant, although afforded an opportunity

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2. Rule 12(b)(2)—Defenses and Objections Which Must be Raised.
Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

to do so prior to trial, knowingly allowing himself to be placed in jeopardy before raising a legal defense. ____U.S. at____, 95 S.Ct. 1055, 43 L.Ed.2d at 277.[3] It must be remembered that the question being considered was only that of the right of the government to take an appeal under 18 U.S.C.A. § 3731. This statute permits an appeal by the government unless further prosecution is prohibited by the double jeopardy clause. The question saved went only to this and not, as the majority opinion does, to the delay being a bar of a jeopardy defense itself.

Whatever the Supreme Court meant by its reservation of the question, I do not understand it as creating a problem in this case. We have, in effect, entertained the appeal to determine whether we have jurisdiction under 18 U.S.C.A. § 3731. Section 3731 provides that no appeal shall lie where the double jeopardy clause of the Constitution prohibits further prosecution.[4] What the government has in fact appealed is the question whether jeopardy had attached. Thus we are in the position of having to take jurisdiction to determine if the appeal will lie. By way of analogy, *cf.* Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, which teaches that there are cases where jurisdiction must be exercised for the purpose of determining jurisdiction. This is such a case. If we found no error in the district court's conclusion that jeopardy had attached, it would follow that the appeal

3. 18 U.S.C.A. § 3731 provides:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

4. *Cf.* United States v. McGough, 5 Cir., 1975, 510 F.2d 598, 602 n. 2.

would be dismissed rather than affirmed. This was the precise procedure followed in *Jenkins, supra,* in the Second Circuit. United States v. Jenkins, 2 Cir., 1973, 490 F.2d 868, 880.

It must be conceded that the reservation in *Serfass* of the deliberate delay question is perplexing. It purportedly goes only to the right of appeal but, as expressed, it could relate also to barring double jeopardy as a defense. In any event, it is doubtful that the court would treat a constitutional right in such an off-hand fashion.

The Supreme Court has not considered the question whether the delay in attacking an indictment may bar a double jeopardy defense. The law of this circuit is that an indictment may be challenged for the first time on appeal, and after trial and conviction. Walker v. United States, 5 Cir., 1965, 342 F.2d 22, 26. It is also the law in other circuits. United States v. Beard, 3 Cir., 1969, 414 F.2d 1014, 1017; United States v. Bailey, 7 Cir., 1960, 277 F.2d 560, 562.

It is true that the delay was an admitted trial tactic but experienced counsel were taking advantage of what is expressly permitted by Rule 12(b)(2). They wished to see the government's case before they moved to strike the indictment. The trial court could have ruled, but did not that the motion came too late. It happened that the court (the trier of the facts) considered the facts in its ruling and this gave rise to the double jeopardy claim.

The obtuse problem presented in this appeal is but another example of the labyrinthian state of criminal law, praticularly in the trial stages. Although not without some apprehension, I believe that defendants have the better side of the case and I would, therefore, sustain the district court judgment and dismiss the appeal.

APPENDIX D

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. 73-H-413

UNITED STATES OF AMERICA

vs.

CORNELIUS J. KEHOE
AND RAY K. BULLOCK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court: United States of America vs. Cornelius J. Kehoe and Ray K. Bullock, criminal number 73-H-213, the following constitutes the findings of fact and conclusions of law, and may be amended or supplemented at a later time.

The court accepts as true the testimony of all the defendants' witnesses.

The court accepts their version of the facts of this case since they are not contested.

The court finds that in 73-H-213 jeopardy has attached.

Criminal number 73-H-413 is dismissed as to both defendants because jeopardy has attached.

The government is barred from trying them again.

The court finds that Judge Bue's opinion was not based on a motion to dismiss under Rule 12, but that the judgment of acquittal was granted under the federal rule of criminal procedure 29(A).

Rule 29(A) cites that judgment of acquittal shall be granted if the evidence is insufficient to sustain a conviction of such offense or offenses.

The motion which was filed at the conclusion of the evidence in chief of the government's case was a

[78]

motion and so called a motion for judgment of acquittal, which is the way to raise the question of sufficiency of the evidence.

I might point out in Judge Bue's opinion the last paragraph on page 6, and I will read it:

"This court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the government's case. Had "—I emphasize had—" had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants."

That shows to me that Judge Bue not only was deciding this case on whether or not the indictment stated an offense which should have been raised by Rule 12 and, of course, Rule 12 motions can be raised at any time,

but that this opinion that he wrote and signed on the 8th day of November, 1973 did go to the sufficiency of the evidence because it was before him and it was before the jury and the judge had to dispose of it.

[79]

He could not dispose of part of it without disposing of all of it.

That the government did not appeal from that decision.

If the government now contends that that judgment of acquittal was really a motion to dismiss under Rule 12, the court ruled against the government and the government had a duty to appeal a motion to dismiss if they considered that now a motion to dismiss because the indictment does not state an offense.

The way you raise the question of whether or not an indictment states an offense is by Rule 12 and that gives the government the right to appeal if the judge rules against the government.

Because of the doctrine of collateral estoppel and the doctrine of due process of law, it would be unfair for the government now to come in and say that this was a motion to dismiss because the indictment did not state an offense.

The language at the bottom of page 6 and continued on page 7 I have read convinces me that since you had a jury, that one of the reasons Judge Bue granted the motion for judgment of acquittal, and I emphasize that that was before the court then, a motion for judgment of acquittal, which under Rule 29 can only be granted if the evidence is

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insufficient to sustain a conviction of such offense or offenses.

That double jeopardy does attach in this case, even if Judge Bue had made a mistake or if he himself was confused in his opinion because the fact of the matter is the defendants did plead not guilty and the government offered all the evidence that they could offer on the guilt of the defendants and they did have a trial and the judgment of acquittal under Rule 29 was granted.

That it would be manifestly unfair and unjust to subject these defendants to a trial on this case again in view of the other facts which I have heard from the defendants in this hearing, which I accept to be true.

I might further state that you don't test the sufficiency of an indictment by the proof that's offered later on.

The sufficiency of the indictment is determined by the face of the indictment.

It seems to me that this indictment, from what he says at the bottom of page 6 and beginning of page 7, could have well stated an offense and the government has carved out of an offense and they have carved once and they can't carve it again.

Therefore, by the doctrine of carving as well as equitable collateral estoppel, they cannot try these

[81]

defendants on the same sets of facts again.

I am not passing on whether or not there was bad faith in the prosecution of this case because I have heard no evidence to the contrary, but am not passing on it.

I am not passing on whether or not there was a mistake or an accident in the government taking the position that you can embezzle land, but from the record, it shows the government pursued that theory that you can embezzle land from the beginning, either through mistake or not, and it was calculated to break or injure the defendants, not only in their mental condition and anxiety that they suffered, but also unnecessary expenses and also time of the court.

That meant that the government has taken up a long time in trying this case and now they want to take up some more time to try it again under what I would say is a mistake or accident.

The government did have the right to appeal this case. If they now take the position that what Judge Bue did was a granting of a motion to dismiss, when the court sustains a motion to dismiss and the government has a right to appeal that, which they didn't do, so they now, because of due process of law and collateral estoppel, they cannot now come into court and say that we think it was a motion to dismiss that was granted because it didn't state an offense, but we didn't appeal it, so we are going to put the

[82]

defendants to the expense of another trial.

The defendants were tried before a jury, a Rule 29 judgment of acquittal was entered, and, although Judge Bue must interpret his opinion differently from the way I do, I am convinced that jeopardy is attached.

I finally would say that this does not extend to the other two cases pending in Judge Hannay's court.

This decision is not based on the fact that those cases have been pending a year, but I am persuaded somewhat by the facts that I have heard in this case and they reinforce the reason that equity and inherent fairness and due process of law compel this court to grant the defendants' motion to dismiss because of double jeopardy.

Now, that disposes of this case as far as this court is concerned. I am sure that Mr. Novak will appeal this decision, which he has a right to do, because it is a most unusual case, and it's a case that has caused this court a great deal of trouble because of the fact that I am passing somewhat on what another judge says, but, as I have told the lawyers and as Mr. Novak told the court, that when the reindictment came down in 413, that Judge Bue told Mr. Novak that he wanted the case not in his court and it wound up in my court and I didn't know that, of course, but I went to Judge Bue in our regular conference and brought it up to Judge Bue and the other judges.

[83]

Judge Bue asked me to keep the case.

Of course, I told Judge Bue that in effect I would be passing upon his opinion, and I don't mind doing that because we have to pass on opinions and facts all the time that are in dispute—some people can interpret it differently and, of course, Judge Bue knows that, and he knows that we all have to do our duty, as everyone has done in this case, as far as I can see, their duty.

We will leave it up to the court of appeals to decide if this court was right or not.

Thank you very much.

WOODROW SEALS

APPENDIX E

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. 73-H-213

UNITED STATES OF AMERICA

v.

CORNELIUS J. KEHOE and
and RAY K. BULLOCK

OPINION

(Informal written opinion of Judge Carl O. Bue, Jr.,
in chambers on November 1, 1973)

This Court has given close consideration to the Defendants' argument and authorities in support of their motion for judgment of acquittal as well as the Government's response, both as set forth in written legal memoranda as well as in conference in chambers yesterday. The legal area in question is not without considerable difficulty. In a relatively brief but intensive search of authorities which included a check of annotations, legislative history, and even a call to the Library of Congress, this Court has found no federal authority discussing whether or not embezzlement applies, or should apply, to real property as alleged in the indictment against these two defendants. This Court has located only a few

cases in state jurisdictions wherein the issue was considered. It is the opinion of this Court that historically the term embezzlement has been limited only to personal property. In the absence of specific legislation reflecting a clear intent to expand the term to cover real property, the more persuasive view of the existing jurisprudence is that embezzlement statutes were never intended by legislatures to cover offenses relating directly to real property such as is alleged in the indictment before this Court.

This is a criminal case in which the contents of an indictment must necessarily be scrutinized with great care. The Court is fully aware of the thrust of Rule 29 as well as the

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significance of Rule 12(b)(2) of the Federal Rules of Criminal Procedure. These have been carefully considered. Because the Government has not met its burden of proof in demonstrating that the indictment recites an offense for which prosecution may be brought, a Judgment of Acquittal as to both defendants will be entered. This Court will issue a memorandum opinion within the next few days setting forth in greater detail the legal basis on which this conclusion was reached.

[1]

EXHIBIT B

MEMORANDUM AND ORDER
CRIMINAL NO. 73-H-213

(Caption Omitted)

(Filed November 8, 1973)

Following completion of the Government's case, the defendants moved for judgment of acquittal under Fed. R. Crim. P. 29(a) alleging several grounds in support thereof. Of central importance to this Court's decision was the claim that the indictment failed to charge an offense against the laws of the United States of America, this being a non-waivable defense under Fed. R. Crim. P. 12(b)(2). In what is apparently a case of first impression in the federal courts, this Court felt constrained to grant defendants' motion for the reasons set forth below.

The indictment charged that defendants Kehoe and Bullock, President and Advisory Director, respectively, of Surety Savings Association, an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, embezzled .3082 acres of land, valued at $35,000, belonging to said institution, in violation of Title 18, United States Code, Section 657. Construing the evidence most favorabbly to the

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Government, the defendants were essentially charged with having used their fiduciary positions of authority to convey title to the land from Surety Savings to a third party. The sole consideration was alleged to have been the assumption by that third party of a promissory note for

$35,000 on which the defendants were contingently liable. It was alleged that no consideration flowed to Surety Savings as a consequence of the conveyance of its property. The defendants strongly contest these assertions and contend that had they gone forward with the defense, they would have shown full consideration flowing to Surety Savings in an environment of bona fide, legal and legitimate business negotiations.

The critical issue before this Court was whether or not real property may be "embezzled" under this statute as alleged in the indictment.

Section 657, Title 18, United States Code provides, in pertinent part:

> Whoever, being an officer . . . of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . embezzles, abstracts, purloins or wilfully misapplies any monies, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise entrusted to its care, shall be fined . . . or imprisoned. . . .

Embezzlement has been defined for federal courts as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come". *Moore v. United States,* 160 U.S. 268, 269-70, 40 L.Ed. 422, 424, 16 S.Ct. 294, 295 (1895); *Woxberg v. United States,* 329 F.2d 284, 290 (9th Cir. 1964); 29A C.J.S. *Embezzlement* § 1 (1965); 26 Am. Jur. 2d *Embezzlement* § 1 (1966). It has

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been stated that embezzlement is a purely statutory offense, not having been a crime at common law. *Hughes v.*

United States, 4 F.2d 686, 687 (8th Cir. 1925); 29A C.J.S. *Embezzlement* § 2 at 4-5 (1965); 26 Am. Jur. 2d *Embezzlement* § 1 at 549-50 (1966). *Contra United States v. Davenport*, 266 Fed. 425, 431 (W.D. Tex. 1920), *aff'd* 267 Fed. 803 (5th Cir. 1921); *United States v. Cadwallader*, 59 Fed. 677, 680 (W.D. Wis. 1893) [both district courts citing 4 Bl. Comm. 231, an authority not readily available to this court]. This Court's necessarily limited review of embezzlement and its history comports fully with the following summary:

> Embezzlement is purely statutory in its origin; it was unknown at common law, which, insofar as personal property was concerned, penalized only interferences with possession. Accordingly, at common law, if the possession of personal property was lawfully obtained in the first instance, its subsequent appropriation by the possessor constituted no offense. It was this failure of the common law to provide any criminal remedy for these breaches of trust, incident to the multiplying affairs of business on the part of servants, clerks, agents, bailees, trustees, and other persons occupying fiduciary positions that led to the enactment of the present Penal Code provision dealing with embezzlement. These provisions were not, however, intended to provide against every breach of duty or pecuniary obligation on the part of agents and employees toward principals and employers. Accordingly, in applying those articles of the Code to the various cases that may arise, careful discrimination is required, for it is sometimes difficult to draw with entire precision the line of demarcation between acts punishable as crimes under the code and those that are not within its purview, although presenting instances of breach of trust.

21 Tex. Jur. 2d Embezzlement and Conversion § 2 at 579-80 (1961).

The Government has contended that the statutory language "other things of value" was sufficiently broad to include real

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property. The defendants have contended that the Court should apply the statutory rule of construction denominated "ejusdem generis" wherein the phrase should be construed to include only those things of the same class or nature as those specifically enumerated in the statute, this class being limited to items of personal property.[1]

While there are critical distinctions between embezzlement and the other offenses included within this statute, all are basically similar in nature to larceny. *See Morissette v. United States,* 342 U.S. 246, 260-61, 96 L.Ed. 288, 299, 72 S.Ct. 240 (1951); *Moore v. United States,* 160 U.S. 268, 40 L.Ed. 422, 16 S.Ct. 294 (1895); *United States v. Northway,* 120 U.S. 327, 30 L.Ed. 664, 7 S.Ct. 580 (1887). Larceny is commonly defined as "the felonious taking and carrying away of the personal goods of another". *United States v. Turley,* 352 U.S. 407, 412, 1 L.Ed.2d 430, 434, 77 S.Ct. 397 (1957). The elements of embezzlement are admittedly somewhat different.

> [Embezzlement] differs from larceny in that the fact that the original taking of the property was lawful, or

1. The rule of *ejusdem generis,* closely related to that of *noscitur a sociis,* remains a valid rule of construction. *See United States v. Standard Oil Co.,* 384 U.S. 224, 228, 16 L.Ed.2d 492, 495, 86 S.Ct. 1427 (1966); *Haberman v. Equitable Life Assurance Society of United States,* 224 F.2d 401, 405 (5th Cir. 1955), *reh. den.,* 225 F.2d 837, *cert. denied,* 350 U.S. 948 (1956). The proper application of these rules is thoroughly discussed elsewhere. *See* 50 Am. Jur. *Statutes* §§ 249, 250 (1944). Most of the United States Supreme Court cases discussing the application and limits of these rules have been annotated. *See Annot.,* 94 L.Ed. 464 (1949).

> with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Moore v. United States, 160 U.S. 268, 269, 40 L.Ed. 422, 424, 16 S.Ct. 294, 295 (1895). *See also United States v. Powell*, 294 F.Supp. 1353, 1355 (E.D. Va. 1968), *aff'd*, 413 F.2d 1037 (4th Cir. 1969); 29A C.J.S. *Embezzlement* § 5 (1965). Notwithstanding this fact, and notwithstanding the apparent majority view that "embezzlement" is a purely statutory rather than common law offense, the term, nevertheless, has acquired a well established connotation which approaches the sanctity of a common law meaning. *United States v. Northway, supra*, 120 U.S.

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at 334, 30 L.Ed. at 666. It is limited to items of personal property, similar to the offense of larceny after which embezzlement was patterned. Where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the United States Supreme Court has held that the general practice is to give that term its common-law meaning. *United States v. Turley*, 352 U.S. 407, 411, 1 L.Ed.2d 430, 433, 77 S.Ct. 397 (1957). This same practice appears to be proper for established terms such as "embezzlement".

In 1896 the Supreme Court of California was confronted with virtually the identical issue now before this Court, the specific statute there under consideration being one pertaining to "false pretenses".

> And the offense of false pretenses, under the English statutes, has always been construed as largely analog-

ous to, and closely bordering upon, that of larceny, and as applying only to personal property, which was capable of manual delivery, and the subject of the latter offense, and has always been punishable in much the same manner as larceny. Real property under the English law was never the subject of the offense either of cheating or of false pretenses. Being incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty. Since it could not be carried away and dissipated like chattels, although a man might be deprived of his landed estate by means of fraudulent practices and devices, yet the property was bound to remain stationary, and accessible to the reach of the law, and he was relegated to the civil courts for his redress of the wrong.

Our American statutes upon the subject have all followed more or less closely those of England. As indicated, there are slight differences in language, but in substantive purpose and effect they are the same.

[6]

People v. Cummings, 114 Cal. 437, 46 P. 284 (Sup. Ct. 1896). Other state cases which have been located reach the identical conclusion for substantially the same reasons. *See State v. Clark,* 60 Ohio App. 367, 21 N.E. 484 (1938); *Mannng v. State,* 175 Ga. 875, 166 S.E. 658 (Sup. Ct. 1932); *State v. Eno,* 109 N.W. 119 (Sup. Ct. Iowa, 1906). This Court has thoroughly reviewed federal criminal statutes, and annotations relating thereto, similar in nature to embezzlement, theft and larceny[2] and has been unable to find any legislative indication that Congress has sought to modify the traditional definition

2. 18 U.S.C. §§ 641-60.

and limitations of larcenous-like offenses. The logic of *People v. Cummings,* as applied in a federal context, appears to be as valid now as it was in 1896. It was instructive to this Court to note that the California legislature subsequently amended the California statute at issue in *Cummings.* The California Supreme Court thereafter held that it was proper for the legislature to depart from the common law by specifically including real property within the statute. *People v. Rabe,* 202 Cal. 409, 416, 261 P. 303, 306 (Sup. Ct. 1927). Since then real property in California has been held to be properly the subject of embezzlement, *People v. Roland,* 134 Cal. App. 675, 26 P.2d 517 (1933), as well as larceny. *People v. Pugh,* 137 Cal. App. 2d 226, 289 P.2d 826 (1955), *app. denied,* 352 U.S. 885 (1956); *People v. Brunwin,* 2 Cal. App. 2d 287, 37 P.2d 1072 (1934).

This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale

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for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is

a fine one, it is one that is critical to the offense of "embezzlement".

Criminal statutes are to be construed strictly with an eye to precedent, legislative history and common sense. *See United States v. Standard Oil Co.*, 384 U.S. 224, 255, 16 L.Ed.2d 492, 494, 86 S.Ct. 1427 (1966). This Court has made every effort to do so and has found no legislative indication that the traditional personal property limitation of embezzlement has been abrogated by Congress. For this Court to hold that real estate may be the subject of embezzlement under this federal statute as presently framed would not involve court interpretation, but would constitute judicial legislation.

The restricted usage of the term embezzlement necessitated the application of the doctrine of ejusdem generis to the phrase "other things of value" contained in Title 18, United States Code, Section 657. Properly interpreted, it may include only items of personal property. For the foregoing reasons, this Court granted defendants' motion for judgment of acquittal on the grounds that the indictment failed to state an offense against the United States of America.

DONE at Houston, Texas, this 8th day of November, 1973.

CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
Fifth Circuit

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

October 16, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-4346—U.S.A. vs. CORNELIUS J. KEHOE, and RAY K. BULLOCK

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ SALLY HAYWOOD
Deputy Clerk

* On behalf of Cornelius and Ray Bullock

cc: Mr. James J. Hippard
Mr. Randy Schaffer
Ms. Mary L. Sinderson